

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 14, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP2412-CR

Cir. Ct. No. 2003CF284

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRANDON M. POKEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Ozaukee County: THOMAS R. WOLFGRAM, Judge. *Affirmed.*

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 GUNDRUM, J. Brandon M. Pokey appeals from his judgment of conviction, contending the trial court erred in sentencing him when it made him

ineligible for participation in the Earned Release Program¹ (ERP).² He also appeals the trial court's denial of his motion to modify his sentence to make him eligible to participate in that program. We affirm.

BACKGROUND

¶2 The relevant facts are undisputed on appeal. Pokey robbed a bank, brandishing a rifle and handgun.³ He pointed the rifle at a teller and demanded money, procuring approximately \$7600. He next ordered bank employees to get down on the floor and put their faces in their hands. Pokey then fled and subsequently was arrested and admitted to committing the crime.

¶3 Pokey was charged with and pled no contest to armed robbery with threat of force. The trial court sentenced him to ten years of initial confinement and fifteen years of extended supervision, and, among other decisions, made Pokey ineligible for participation in the ERP. In addressing the ERP, the court stated: “[B]ecause of the seriousness of this offense I am determining that [Pokey] is not at the present time eligible for the Earned Release Program.” Interpreting the court's inclusion of the words “at the present time” as an indication the court might be willing to make him eligible for the ERP in the future, five years after sentencing, Pokey filed a motion to modify his sentence to make him eligible for

¹ Effective August 3, 2011, the legislature renamed the Earned Release Program the Wisconsin Substance Abuse Program. *See* WIS. STAT. § 991.11 (2011-12); 2011 Wis. Act 38, § 19. All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

² Pokey was sentenced in 2005. We reinstated his WIS. STAT. RULE 809.30 (2007-08) direct appeal rights in 2010. The facts related to the reinstatement are of no import to this appeal.

³ The trial court determined that the handgun was a pellet gun and both weapons were unloaded at the time of the offense, but that the victims would have been unaware of these facts.

the program. After hearing arguments, the court denied Pokey's motion. Pokey appeals. Additional facts are provided as necessary.

DISCUSSION

Sentencing

¶4 Pokey contends the trial court erroneously exercised its discretion at sentencing because it based its decision to make him ineligible for the ERP on a single sentencing factor, the seriousness of the offense. He argues that the court erred because it did not also consider Pokey's character, including his rehabilitative needs, or the need to protect the public. We disagree.

¶5 The ERP allows a defendant to convert initial confinement time to extended supervision time if certain substance abuse treatment criteria are met, thereby permitting a defendant to have more time out of confinement but without reducing the overall sentence. *See* WIS. STAT. § 302.05(1), (3)(c)2.; ***State v. Owens***, 2006 WI App 75, ¶5, 291 Wis. 2d 229, 713 N.W.2d 187. An ERP eligibility determination is part of the court's exercise of sentencing discretion. *See* WIS. STAT. § 973.01(3g) (“[T]he court shall, as part of the exercise of its sentencing discretion, decide whether the person being sentenced is eligible or ineligible to participate in the earned release program....”).

¶6 We review sentencing decisions for an erroneous exercise of discretion. ***Owens***, 291 Wis. 2d 229, ¶7. Strong public policy weighs against appellate interference with a trial court's sentencing discretion, and we presume the court acted reasonably in exercising that discretion. ***State v. Harris***, 119 Wis. 2d 612, 622, 350 N.W.2d 633 (1984). In fashioning a sentence, a court must consider the seriousness of the offense, the defendant's character, and the need to protect the public, ***State v. Steele***, 2001 WI App 160, ¶10, 246 Wis. 2d 744, 632

N.W.2d 112; however, the weight a sentencing court attaches to each of these factors is within the court's wide discretion, *State v. Stenzel*, 2004 WI App 181, ¶16, 276 Wis. 2d 224, 688 N.W.2d 20.

¶7 In his brief-in-chief, Pokey acknowledges that the court considered the three required factors in fashioning the confinement and extended supervision portions of his sentence. He argues, however, that the court's consideration of the ERP was flawed because the court only stated it was making Pokey ineligible for the ERP "because of the seriousness of this offense." We agree with Pokey that the trial court properly considered the required factors; however, we view the court as having done so with regard to all aspects of the sentence, including the ERP decision.

¶8 In articulating the reasons for Pokey's sentence, the court pointed to the serious nature of the crime and its traumatic impact on the victims, particularly emphasizing the fact that Pokey had the victims lie face down with their faces in their hands in a manner which the court stated "would have led any reasonable person to fear ... they were about to be executed." In addition, the court considered the importance of protecting the public from Pokey and sending a message to both Pokey and the general public which was designed to deter against similar crimes in the future.

¶9 The court also focused on both positive and negative aspects of Pokey's character. It pointed out that he did not have a prior criminal record, came from an intact family, completed high school, had a stable residence history, and was only eighteen years old at the time of the offense. The court noted Pokey's use of illegal drugs and alcohol, the loss of his job (which the court attributed to substance abuse), that Pokey had problems with alcohol that

“essentially went untreated,” and that Pokey had financial difficulties and was suffering from depression at the time he committed the offense. The court observed that Pokey had the support of family and friends, that his fiancée was pregnant with their first child, and that, while out on bail, Pokey had used the time to engage in counseling, though with mixed results. The court recognized that rehabilitation of individuals is one of the goals of the justice system, as well as punishing individuals for their crimes.

¶10 Following the court’s discussion of the seriousness of the offense, the need to protect the public, and character considerations, the court stated: “For those reasons, I am going to do the following.” The court then pronounced Pokey’s sentence, which included, at the beginning, the initial confinement and extended supervision portions of the sentence and, at the end, its decision to make Pokey ineligible for participation in the ERP. In articulating its ERP decision, the court stated it was making Pokey ineligible for the program “because of the seriousness of this offense.”

¶11 While the court emphasized the seriousness of the offense when it declared that Pokey would not be eligible for the ERP, as we read the sentencing transcript, the court properly considered all of the above factors in making that decision, as well as its other sentencing decisions. However, even if the court had not stated “[f]or those reasons, I am going to do the following” before pronouncing sentence, its ERP decision nonetheless would be valid, for its decision is appropriate “so long as the overall sentencing rationale ... justifies the ERP determination.” *Owens*, 291 Wis. 2d 229, ¶9. The court considered Pokey’s substance abuse problems, and other character attributes, both positive and negative. It considered the need to protect the public and the deterrent effect of its sentence. Nonetheless, it articulated the seriousness of Pokey’s offense as a

dominant consideration. Its decision to give this factor greater weight is within its discretion. See *Stenzel*, 276 Wis. 2d 224, ¶16. Further, the court subsequently clarified at the hearing on Pokey’s motion to modify that it had sentenced Pokey to “the least amount of time that [it] felt was commensurate with the seriousness of what he had done.” The court’s decision to make Pokey ineligible for the ERP because it did not want Pokey’s confinement time reduced through that program was an appropriate exercise of discretion. Because the court’s “overall sentencing rationale” justified its ERP decision, it did not err in denying Pokey eligibility to participate in the program.

Motion to Modify

¶12 Pokey also complains that the court erred in denying his motion to modify his sentence to make him eligible to participate in the ERP. Again, we disagree.

¶13 Wisconsin trial courts, within certain constraints, have inherent authority to modify sentences. *State v. Harbor*, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828. A court may, in its discretion, modify a sentence upon the defendant’s showing of a new factor; when the court determines the original sentence is illegal or void; or when it determines that the sentence is unduly harsh or unconscionable. *Id.*, ¶35 & n.8.

¶14 On appeal, Pokey does not clearly identify the basis for his motion to modify. We interpret his arguments to be that the court may modify his sentence because (1) it suggested at sentencing that it might be willing to make him eligible for the ERP in the future and (2) the court erroneously exercised its discretion at sentencing in denying him eligibility for the program. We have already addressed

the latter argument and thus say no more with regard to it. Pokey's first argument fails as well.

¶15 To begin, Pokey's argument does not appear to fall within any of the recognized grounds for sentence modification, and he has identified no law suggesting it does. Further, in its decision on Pokey's motion to modify, the trial court rejected Pokey's argument, stating:

Now, I reread the transcript at sentencing. I did say at this time. And I apologize for any, quite frankly, any perception that may have caused that I was willing to reconsider that decision at some future point. I was simply making a determination as to his eligibility for those programs when I sentenced him as I'm required to do. So I wasn't inviting or indicating that at some point in the future I was going to change my mind.

Thus, the court concluded that it did not intend to afford Pokey an opportunity to revisit the ERP determination in the future. Because Pokey does not challenge this conclusion on appeal, and we find no error in it, we affirm the trial court's denial of his motion to modify.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

